FEDERALLY SPEAKING

by Barry J. Lipson

Number 33

Welcome to Federally Speaking, an editorial column compiled for the members of the Western Pennsylvania Chapter of the Federal Bar Association and all FBA members. Its purpose is to keep you abreast of what is happening on the Federal scene, whether it be a landmark US Supreme Court decision, a new Federal regulation or enforcement action, a "heads ups" to Federal CLE opportunities, or other Federal legal occurrences of note. Its threefold objective is to educate, to provoke thought, and to entertain. This is the 33rd column. Prior columns are available on the website of the U.S. District Court for the Western District of Pennsylvania (http://www.pawd.uscourts.gov/Headings/federallyspeaking.htm).

LIBERTY'S CORNER

A NON-DISCRETIONARY JUDICIARY. The safety valve in the American Constitutional System is the Judicial Branch. It is the Judiciary's job to oversee the other branches to make sure that our Constitution remains the supreme law of the land. This column has unhappily examined instances were it appears that the Executive Branch is attempting to avoid true Judicial scrutiny of its post 9-11 activities. Now it appears that the Executive Branch is trying to extract the very heart from the Judiciary by removing its discretionary ability to dispense *law, equity, justice and mercy* in an area that directly affects the lives of many Americans, *and could affect us all*, the Criminal Justice System. Thus, on July 28, 2003 the U.S. Attorney General promulgated a memorandum to all federal prosecutors forbidding them to "acquiesce" to downward departures in the Sentencing Guidelines except in rare occurrences, and requiring them to report all Federal Judges imposing such departures from these Guidelines over the prosecutor's objections to the U.S. Department of Justice within 14 days. And this policy was issued in spite of the cautions issued by the Chief Justice of the U.S. Supreme Court, William Rehnquist, just recently on May 5, 2003, that with regard to collecting information on downward departures,"[t]here can also be no doubt that the subject matter of the questions, and whether they target the judicial decisions of individual federal judges, *could amount to an unwarranted and ill-considered effort to intimidate individual judges in the performance of their judicial duties*." Indeed, in 1996 the U.S. Supreme Court authorized downward departures in the Los Angeles Rodney King police beating case

for two police officers from 70 – 84 months to only 30 months, and in so doing Justice Anthony M. Kennedy advised that *the sentencing judge properly and traditionally considers "every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and punishment."* Much of the Attorney General's zeal in this area has been fired by another bill he pushed in Congress, the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act of 2003, the restrictions on judicial discretion in sentencing provisions in which the Judicial Conference of the United States has condemned as being *"hastily passed without consultation,"* and voted for their repeal as this *"new law severely limits the ability of trial judges to depart from the Sentencing Guidelines and requires reports to Congress on any Federal Judge who does so."* One U.S. District Court Judge, John S. Martin, has stated in the *New York Times* "I no longer want to be part of *our unjust criminal justice system*," because "[f]or a judge to be deprived of the ability to consider all of the factors that go into formulating a just sentence is completely at odds with the sentencing philosophy that has been a hallmark of the American system of justice." (Emphasis throughout added.) Indeed, a "non-discretionary judiciary" would appear to be oxymoronic!

"SAFE & FREE" V. "LIFE & LIBERTY". We are at it again! As with Pro Choice, Pro Life, sneak-and-peak, the USA PATRIOT Act and the PROTECT Act, the spin-doctors on both sides of the most critical post 9-11 issues are "prophylactically" enshrouding our psyches and beclouding our auditory facilities to achieve their desired results, sound or unsound, logical or illogical. Thus, the American Civil Liberties Union (ACLU) has labeled its campaign to apply traditional checks and balances to the USA PATRIOT Act and to post-9-11 governmental actions "safe and free;" while the U.S. Department of Justice (DOJ) has labeled its campaign in support of its post-9-11 actions and to keep and expand the USA PATRIOT Act, "life and liberty." And in pursuing these campaigns "mythomania" (medically defined as "the tendency to lie, exaggerate, or relate incredible imaginary adventures as if they had really happened)," may be rearing its ugly head. Indeed, the DOJ on its website "www.lifeandliberty.gov " purports to be "Dispelling the Myths" allegedly mythicized by the ACLU. The ACLU counters that the DOJ is the "mythomaniac," in that the DOJ "in fact creates fresh myths about the law and gives new life to old ones." The DOJ, on its site, cites three alleged "ACLU Myths" it desires to dispel:

Myth I – The Greenpeace Myth. The DOJ claims it is a myth "that the Patriot Act 'expands terrorism laws to include domestic terrorism which could subject political organizations to surveillance, wiretapping, harassment, and criminal action for political advocacy'," and "that it includes a 'provision that might allow the actions of peaceful groups that dissent from government policy, such as Greenpeace [an environmental

activist group], to be treated as domestic terrorism'." To the contrary, the DOJ asserts that "under the Patriot Act, the definition of 'domestic terrorism' is limited to conduct that (1) violates federal or state criminal law and (2) is dangerous to human life," and, therefore, "peaceful political organizations engaging in political advocacy will obviously not come under this definition. (Patriot Act, Section 802.)" But counters the Dartmouth ACLU website: "This 'reality' is actually a myth. Peaceful groups can be targeted. The protests at Puerto Rico's Vieques Island are an example of peaceful protest that could be found to be domestic terrorism under the Patriot Act's definition. It breaks the law, and since Vieques Island has live fire exercises and armed sentries, any protests that trespass onto Federal property could be argued (and has been argued!) to endanger human life." Similarly, it would appear that Greenpeace's interference with shipping could be viewed as violating Federal or state criminal law and being dangerous to human life, so as to justify treating Greenpeace operatives as "domestic terrorists" under this Act. Even blocking traffic with one's own body could be so interpreted. Thus, the National ACLU site concludes that the Patriot Act, Section 802, "introduces a definition of 'domestic terrorism' broad enough to include groups like Greenpeace and Operation Rescue [an anti-abortion/pro-life activist group]."

Myth II – The Library Myth. The DOJ claims it is a myth that patrons' "library habits could become the target of government surveillance," thus leading "us to a society where the 'thought police' can target us for what we choose to read or what Websites we visit" (Patriot Act, Section 215). To the contrary, the DOJ asserts, that while under "the Patriot Act, the government can now ask a Federal Court (the Foreign Intelligence Surveillance Court), if needed to aid an investigation, to order production" of library and other records, this special Court, "however, can issue these orders only after the government demonstrates the records concerned are sought for an authorized investigation to obtain foreign intelligence information not concerning a U.S. person or to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a U.S. person is not conducted solely on the basis of activities protected by the First Amendment." But again counters the Dartmouth ACLU website: "Half truth. The half they aren't telling anyone here is that so long as a government agent says that the record is sought for an authorized investigation, the Foreign Intelligence Surveillance Court (whose workings are secret, hearings are secret, names of judges are secret, locations are secret, and only have the government's lawyers appear before them) are required to issue the order. There is no judicial discretion, the court cannot even evaluate the claim that the record is sought for an authorized

investigation." The National ACLU site further points out that while the DOJ correctly stated that under Section 215 they can not investigated U.S. persons "solely" on First Amendment protected activities, they can "obtain your library records or your medical records or your genetic information," without "probable cause," if there is something else. "The 'something else' could be that you were born in the Middle East, or that you took a trip to Pakistan last year," or even something "one of your friends or associates did… As long as the 'something else' isn't related to First Amendment activity, it can count as a basis for the investigation."

Myth III -- The Sneak-and-Peek Myth. The DOJ claims it is a myth that allowing "law enforcement agencies to delay giving notice when they conduct a search … would mark a sea change in the way search warrants are executed in the United States." To the contrary, the DOJ asserts, Section 213 of the "Patriot Act simply codified the authority law enforcement had already had for decades…. The Supreme Court has held … that [under "the Fourth Amendment"] covert entries are constitutional in some circumstances, at least if they are made pursuant to a warrant," citing "*Dalia v. U.S.*, 441 U.S. 238 (1979)." The ACLU acknowledges that since "1978, the DOJ has had the authority under the Foreign Intelligence Surveillance Act [FISA] to conduct sneak-and-peek searches of Foreign powers and their agents" and that "Foreign powers include groups engaged in terrorism." But the national ACLU site counters that now "Section 213 of the Act … can be used in *any* criminal investigation. Nothing prevents the FBI from using the sneak-and-peek provision in connection with the most minor crimes." Moreover, is reliance on *Dalia* appropriate here? *Dalia* had nothing to do with terrorists or the FISA and only permits covert searches where all Fourth Amendment search warrant criteria are met, to wit, as enumerated by the U.S. Supreme Court in *Dalia*: "First, warrants must be issued by neutral, disinterested magistrates. … Second, those seeking the warrant must demonstrate to the magistrate their probable cause to believe that 'the evidence sought will aid in a particular apprehension or conviction' for a particular offense. … Finally, 'warrants must particularly describe the things to be seized,' as well as the place to be searched. …The Fourth Amendment requires that search warrants be issued only 'upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized'." Does the DOJ want to amend the USA Patriot Act and FISA accordingly? Will the U.S. Supreme Court do so?

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Clearly there are myths here, but who is in reality the mythopoeist? In pondering this and related issues it may be wise to remember the words of our founding fathers, Thomas Jefferson ("The man who would choose security over freedom

deserves neither") and Benjamin Franklin ("They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety"); and those of the greatest tyrant and terrorist of them all, Adolf Hitler ("The great strength of the totalitarian state [terrorist organization] is that it forces those who fear it to imitate it."). In truth, it appears here that the DOJ wants to prevent any threats to "life and limb" no matter the cost, while the ACLU is intent on also protecting the "life and limbs" of Lady Liberty so the cost will not be our Bill of Rights. [13 & 11]

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PRIVELEGED DR. PHIL SURVIVES THIRD. With a degree of glee, "Dr. Phil," of TV Talk Show fame, learned that the Third Circuit has protected him in his guise as mild mannered trial consultant Dr. Philip C. McGraw, by adding itself to the list of those Courts that hold that work product privilege attaches to non-lawyer consultants under certain circumstances. As the three judge panel unanimously advised: "Compelled disclosure of the substance of conversations between Wood, his counsel, and Dr. McGraw would require disclosure of communications protected by the work product doctrine. The communications took place during a consultation that focused on those issues that counsel and Dr. McGraw perceived to be central to the case. Moreover, the communications were intended to be confidential and made in anticipation of litigation. As such, the communications are at the core of the work product doctrine and are only discoverable upon a showing of rare and exceptional circumstances" (though in a "circumscribed" manner client "Wood may be asked whether his anticipated testimony was practiced or rehearsed"). *In re: Cendant Corp. Securities Litigation*, No. 02-4386 (3rd Cir Sept. 16, 2003; Scirica, C.J.). See also Federal Rules of Civil Procedure 26(b)(3) and (4). But, if Circuit Judge Garth had his way, the glee would be increased threefold. Finding untenable and "impossible to execute … the District Court's attempt to 'carve out' allegedly non-privileged 'two-way' communications between a client and a trial consultant during a 'three-way' meeting among counsel, the client, and the trial consultant," Judge Garth concluded "that the discovery which was sought in the instant context was precluded as well by the attorney-client privilege – an issue not reached by Chief Judge Scirica in his opinion…. While I recognize that in certain respects the attorney-client privilege has more narrow parameters than the work product doctrine, see, e.g., *United States v. Nobles*, 422 U.S. 225, 238 n.11 (1975), I nevertheless am satisfied that the attorney-client privilege was operative when Dr. McGraw, the client Wood, and E&Y's counsel were engaged in contemporaneous and simultaneous discussions concerning the instant litigation…. The attorney-client privilege operates to protect from disclosure communications among the client, counsel, and in

circumstances such as are present here, a third party (here, Dr. McGraw) who was assisting E&Y's counsel in the formulation of legal advice. Thus, I am persuaded that in addition to the work product privilege, the attorney-client privilege also protected communications voiced at the meetings of Wood's counsel and Dr. McGraw. As I cannot conceive of how this three-way interchange of views among these three participants at their strategy conferences could be dissected or parsed, leaving only E&Y's questions and advice, I would also hold that the attorney-client privilege was implicated." So here none will get glee from giving Dr. Phil the third degree.

CRIMINAL TRESPASS AND THE NO CALL LIST. In Pennsylvania we have had the "no call list" law in effect for a while now. No unwanted calls during dinner, after dinner or before dinner! It works and it's great! Fifty-one million households have now, in effect, posted through the Federal Trade Commission "No Trespassing" notices on their private telephones. While, apparently, the FTC did not have authority to collect or post such notices at first, Congress with unbelievable speed has fixed that. Now, another Federal Judge tells us that this program violates the First Amendment as being unequally applied. You all know your columnist is a great supporter of the First Amendment and free speech. Without it you probably would not be reading this column. But you can also properly post your private property to selectively deny access to your yard, doors or windows, to undesirable pamphleteers or others who may disturb your quite enjoyment of your private property. Sure the U.S. Supreme Court has recently held that local government cannot do so, at least with regard to non-commercial speech, but you as a private individual surely can. In most jurisdictions trespassing is a crime called, strangely enough, "criminal trespass," which normally occurs when a person enters or stays on the property of another *without the owner's consent*. In Tennessee, for example, "the law assumes that the person knew they didn't have the owner's consent if the owner or someone with the authority to act on behalf of the owner personally communicates this fact to her, or if there's a fence around the property or if there's a sign or other posting on the property that's likely to be seen by intruders"*(Martindale-Hubbell).* Since fifty-one million householders, acting individually, have so notified certain telemarketers through their agent, the FTC, in a manner so that these telemarketers now know they are unwanted intruders on the private property of another, to continue to so intrude would be a crime, and there certainly can be no First Amendment violation here unless the common law and legislatively recognized crime of criminal trespass is itself unconstitutional (and cross burning, littering and other intrusions on private property would also be protected free speech). That's one phone owner's opinion.

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